

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





74-1330

UNITED STATES COURT OF APPEALS  
For The Second Circuit

B  
P/S

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73 CR. 914

Docket No. 74-1330

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ARIEL FERNANDEZ-TORRES,

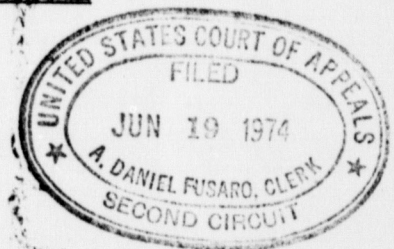
Defendant-Appellant.

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APPELLANT'S APPENDIX

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THOMAS J. LILLY  
Attorney for Defendant-Appellant  
1140 Avenue of the Americas  
New York, N. Y. 10036  
(212) 986-3737



PAGINATION AS IN ORIGINAL COPY



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P. 721377

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

3 CR 014

UNITED STATES OF AMERICA

INDICTMENT

- against -

Cr. No. \_\_\_\_\_  
(T. 21, U.S.C., §841(a)(1)  
and T. 18, U.S.C., §2)

ARIEL FERNANDEZ-TORRES,

Defendant.

OCT 11 1973

THE GRAND JURY CHARGES:

COSTANTINO, J.

COUNT ONE

On or about the 9th day of June, 1971, within the Eastern District of New York, the defendant ARIEL FERNANDEZ-TORRES, did knowingly and intentionally possess, with intent to distribute, approximately 112.2 grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, U.S.C., §841(a)(1) and Title 18, U.S.C., §2).

COUNT TWO

On or about the 9th day of June, 1971, within the Eastern District of New York, the defendant ARIEL FERNANDEZ-TORRES, knowingly and intentionally did distribute approximately 112.2 grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, U.S.C., §841(a)(1) and Title 18, U.S.C., §2).

COUNT THREE

On or about the 20th day of July, 1971, within the Eastern District of New York, the defendant ARIEL FERNANDEZ-TORRES, did knowingly and intentionally possess, with intent to distribute, approximately 122.4 grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, U.S.C., §841(a)(1) and Title 18, U.S.C., §2).

COURT FOUR

On or about the 20th day of July, 1971, within the Eastern District of New York, the defendant ARIEL FERNANDEZ-TORRES, knowingly and intentionally did distribute approximately 122.4 grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, U.S.C., §841(a)(1) and Title 18, U.S.C., §2).

A TRUE BILL.

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Foreman.

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UNITED STATES ATTORNEY



## United States District Court

FOR THE  
EASTERN DISTRICT OF NEW YORKCLERK'S OFFICE  
DISTRICT COURT E.D. N.Y.

MAR 3 1974

United States of America  
v.  
ARIEL FERNANDEZ-TORRES

No. 73 CR 914

TIME A.M. ....  
P.M. ....

On this 8th day of MARCH, 1974 came the attorney for the government and the defendant appeared in person and with counsel

IT IS ADJUDGED that the defendant upon ~~plea of~~ a verdict of guilty

has been convicted of the offense of violating T-21, U.S. Code, Sec. 841(a)(1) and T-18, U.S.C. Sec. 2, in that on or about and between June 9, 1971 and July 20, 1971, the defendant, did knowingly possess and did distribute heroin, a Schedule I drug controlled substance

as charged<sup>3</sup> in counts 1 to 4 incl.

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 8 years on count 1 and 8 years on count 2; to run concurrently and 6 years on each of counts 3 & 4 to run concurrently with counts 1 and 2 pursuant to T-18, U.S. Code, Sec. 4208(a)(2) and 5 years special parole term.

IT IS ADJUDGED that<sup>5</sup>

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to<sup>6</sup>

*William A. Lott*  
United States District Judge.

Clerk.

<sup>1</sup>Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel. <sup>2</sup>Insert (1) "guilty and the court being satisfied there is a factual basis for the plea." (2) "not guilty, and a verdict of guilty." (3) "not guilty, and a finding of guilty." or (4) "nolo contendere," as the case may be. <sup>3</sup>Insert "in count(s) number" if required. <sup>4</sup>Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. <sup>5</sup>Enter any order with respect to

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-against-

ARIEL FERNANDEZ-TORRES,

Defendant.

---

73 CR 914

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the annexed affidavits of THOMAS J. LILLY, sworn to November 9<sup>th</sup>, 1973, and ARIEL FERNANDEZ, sworn to November 2, 1973, the undersigned will move this Court, on the 20<sup>th</sup> day of November, 1973, at 10:00 A. M., for an order,

(1) pursuant to the Rules of the Second Circuit Court of Appeals, and the Eastern District Plan For Achieving Prompt Disposition of Criminal Cases, and the Fifth and Sixth Amendments of the United States Constitution, dismissing the indictment, and

(2) pursuant to Brady vs. Maryland, 373 U. S. 83, directing the United States of America to produce any and all evidence favorable to the defendant, including but not limited to any exculpatory statements by the defendant or other persons in the possession of the government.

Dated: New York, N. Y.  
November 8, 1973

Yours, etc.

THOMAS J. LILLY  
Attorney for Defendant  
Office & Post Office Address  
1140 Avenue of the Americas  
New York, N. Y. 10036  
(212) 986-3737



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-against-

ARIEL FERNANDEZ-TORRES,

Defendant.

---

73 CR 914

AFFIDAVIT

STATE OF NEW YORK            )  
                                  :       ss.:  
COUNTY OF NEW YORK        )

THOMAS J. LILLY, being duly sworn, deposes and says that he is an attorney representing the above defendant and fully familiar with the facts and circumstances herein.

1. This affidavit is submitted in support of the defendant's motion to dismiss the indictment on the grounds that this prosecution is barred by the Fifth and Sixth Amendments of the United States Constitution, the Rules of the Second Circuit Court of Appeals, and the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases.

2. Defendant was named in a complaint, sworn to February 7, 1972, submitted in support of a warrant for the arrest of the defendant, also dated February 7, 1972. At that point, the defendant became an "accused" entitled to the speedy trial protection of the Sixth Amendment and the prosecution time limitation contained in the aforementioned Rules of Second Circuit and of this Court.

3. The defendant was arrested on October 5, 1973, one year and eight months after the filing of the complaint and the issuance of the arrest warrant. He has been arrested for alleged violations that occurred more than two years prior to his arrest.

4. Bearing in mind the defendant's narcotic addiction, limited education, and other personal factors impairing the defendant's power of recall, the delay in prosecution, coupled with the resulting prejudice from the defendant's inability to recall his life circumstances, whereabouts, companions, etc., mandate the dismissal of this indictment as violative of the due process requirements of the Fifth Amendment.

5. During the entire period of time since the alleged violations in June and July, 1971, and the issuance of the arrest warrant on February 7, 1972, the defendant has been a resident either of New York City or a federally supported narcotic center in Patterson, New Jersey, and, therefore, available for prosecution by federal authorities. He did not undertake any evasive steps to avoid federal authorities and, in fact, resided around the clock in an institution supported by federal funds.

WHEREFORE, it is requested that the indictment be dismissed due to the unconscionable delay since the alleged violations and the filing of the complaint or, in the alternative, that a pre-trial hearing be directed regarding the circumstances of the delay in prosecution.

---

Thomas J. Lilly

Sworn to before me this  
9th day of November, 1973

MONROE FINK  
Notary Public, Sealing by  
Qualification Notarized  
RECEIVED 30-1246635  
COM. M. Exp. 3/30/75



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

73 CR 914

-against-

AFFIDAVIT

ARIEL FERNANDEZ-TORRES,

Defendant.

---

STATE OF NEW YORK

)

:

ss.:

COUNTY OF NEW YORK

)

ARIEL FERNANDEZ, being duly sworn, deposes and says:

1. I am the defendant named in this indictment. I am a High School drop-out and have been awarded a High School equivalency diploma.

2. I have been shown a warrant for my arrest dated February 7, 1972, issued on the complaint of Eugene McElroy, sworn to February 7, 1972, alleging certain narcotic violations to have taken place on July 20, 1971.

3. During the period June through July, 1971, I resided at 27 Jefferson Street, Brooklyn, New York. Thereafter, I resided at approximately 5 locations in the East New York or Williamsburgh sections of Brooklyn until December 31, 1972.

4. I did not leave the confines of the City of New York at any time or for any purpose for the entire period from June 1971, until December 31, 1972.

5. On January 1, 1973, I took up residence as an in-patient addict at the Good Samaritan Center, a drug rehabilitation center in Patterson, New Jersey, where I remained until January 14, 1973. This Center is financed and supported by the United States Government.

6. On January 16, 1973, I began employment as a building superintendant and resided at 5 Colt Street, Patterson, New Jersey, where I remained until July, 1973.

7. In approximately July 1973, I was admitted to Greystone State Hospital Morristown, New Jersey, as a psychiatric patient and remained there for treatment for about three weeks.

8. After my discharge from Greystone Hospital, I again took up residence, on August 16, 1973, at the Good Samaritan Center in Patterson, New Jersey, for about one month.

9. I returned to Brooklyn in September, 1973, remaining with various friends in East New York.

10. I was not aware of any warrant for my arrest until I was arrested by federal agents on October 5, 1973. During the period of time between the alleged violations on June 9, 1971, and July 20, 1971, and my arrest on October 5, 1973, I was not a fugitive since I did not undertake any steps to evade arrest. I no longer have any recollection of the events on or about June 9, 1971 and July 20, 1971. I am not able to recall any of my activities on or about those dates, nor can I recall the persons with whom I was in contact at those times, nor my precise whereabouts. The inordinate delay in the prosecution of



this case has prejudiced my ability to defend myself.

WHEREFORE, it is requested that the present indictment be dismissed as violative of my constitutional rights under the Fifth and Sixth Amendments.

---

Ariel Fernandez

Sworn to before me this  
24 day of November, 1973

---

THOMAS J. LILLY  
Notary Public, State of New York  
No. 30-7563550  
Qualified in Nassau County  
Term Expires March 30, 1978

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA

AFFIDAVIT

- against -

72 CR 914

ARIEL FERNANDEZ-TORRES,

Defendant.

- - - - - X

STATE OF NEW YORK)

) SS:

COUNTY OF KINGS )

KENNETH J. KAPLAN, being duly sworn, deposes and says:

1. That he is an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such.
2. That he represents the United States of America in connection with this matter and is fully familiar with the facts of the instant case and all proceedings had herein.
3. That he makes this affidavit in opposition to defendant's motion to dismiss the indictment on the grounds that the Government has failed to provide the defendant a speedy trial.
4. That, on October 11, 1973 an indictment was filed in the Eastern District of New York, charging the defendant ARIEL FERNANDEZ-TORRES with distribution and possession with the intent to distribute certain quantities of heroin on two occasions, June 9, 1971 and July 20, 1971, in violation of 21 U.S.C. §841(a)(1).
5. That, subsequent to July 20, 1971, Agents of the Bureau of Narcotics and Dangerous Drugs attempted to ascertain the identity of the aforesaid ARIEL FERNANDEZ-TORRES.
6. That, on February 7, 1972, the Honorable Max Schiffman, United States Magistrate, Eastern District of New York issued an arrest warrant for the apprehension of the aforesaid defendant.
7. That Agents of the Bureau of Narcotics and Dangerous Drugs attempted to locate the aforesaid defendant for the express purpose of executing the arrest warrant.



8. That, on February 9, 1971 the Agents of the Bureau of Narcotics and Dangerous Drugs ascertained that the aforesaid defendant no longer resided at 27 Jefferson Street, Brooklyn, his last known address.

9. That the Agents of the Bureau of Narcotics and Dangerous Drugs ascertained that the aforesaid defendant had abandoned his apartment approximately two months prior to February, 1972, without paying his rent.

10. That, on February 16, 1972 one Martha Velez, a paramour of ARIEL FERNANDEZ-TORRES, stated that she lived with the aforesaid individual for a period of approximately six months until December, 1971.

11. That the aforesaid Martha Velez further stated that she had not seen ARIEL FERNANDEZ-TORRES since December, 1971, nor did she know his whereabouts.

12. That, on or about April 25, 1972, information was received by the Bureau of Narcotics and Dangerous Drugs which indicated that the aforesaid defendant might be living in Puerto Rico.

13. That the Agents of the Bureau of Narcotics and Dangerous Drugs made numerous unsuccessful efforts to locate ARIEL FERNANDEZ-TORRES, in New York and Puerto Rico.

14. That, the Agents of the Bureau of Narcotics and Dangerous Drugs interviewed the parents of the aforesaid defendant, and others who might be knowledgeable of his whereabouts, and conducted investigations such as a motor vehicle registry search.

15. That on September 17, 1973, it was ascertained that the aforesaid defendant had resided with his sister, Igna Fernandez, from January, 1973 to August 1973 in Paterson, New Jersey, and had left her residence without explanation in mid-August 1973.

16. That, on October 5, 1973 ARIEL FERNANDEZ-TORRES was arrested in New Jersey.

17. That, on October 11, 1973, the aforesaid defendant was indicted.

18. That, on October 16, 1973, the aforesaid defendant entered a plea of not guilty before the Honorable Mark A.

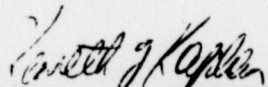
Costantino, United States District Judge.

19. That, on October 16, 1973, the Government filed a Notice of Readiness for Trial.

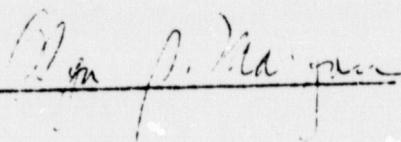
20. That the foregoing facts indicate that the Agents of the Bureau of Narcotics and Dangerous Drugs acted with all due diligence in attempting to locate and apprehend the aforesaid defendant, a fugitive from justice.

WHEREFORE, it is respectfully requested that defendant's motion be denied in all respects.

Dated: Brooklyn, New York  
November 20, 1973

  
\_\_\_\_\_  
KENNETH J. KAPLAN  
Assistant U.S. Attorney

Sworn to before me this  
20th day of November 1973

  
\_\_\_\_\_  
OLGA S. MORGAN  
Notary Public, State of New York  
Qualified in New York County  
Commission Expires March 10, 1975



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

---

UNITED STATES OF AMERICA

-against-

73 Cr. 914

ARIEL FERNANDEZ-TORRES,

Defendant.

---

REQUESTS TO CHARGE

Defendant respectfully requests that the jury be instructed as follows:

1. The government must prove beyond a reasonable doubt that the perpetrator of the unlawful acts charged in the indictment was, in fact, the defendant, and the jurors should consider as a factor the lapse in time between the occurrence of the crime and the identification of the defendant by the witness in court.

United States v. Levi, 405 F. 2d 380, 4th Cir., (1968).

2. The testimony of a witness who is alleged to have assisted the defendant in the commission of a crime should be received with great caution and weighed by the jury with great care.

United States v. Marks, 368 F. 2d 566, 2nd Cir., (1966).

2pm#1<sup>1</sup>  
HS/elc<sup>2</sup>

73CR914<sup>3</sup>  
11/30/73<sup>4</sup>

McElroy-cross

22

MR. LILLY: Did you want to say something for the record?

THE COURT: I do not want to say anything.

MR. LILLY: I would like to have the record indicate, or at least clarify, that the Court has prohibited the defendant from examining Government's Exhibit 1 contemporaneously with my examination.

Further, the Court has prohibited me from discussing the contents of Exhibit 1 with the defendant --

THE COURT: Permitted the attorney to examine the entire record for the purpose of examining this witness at this time, as to whether or not the defendant was unavailable at the time --

MR. LILLY: For the purpose of clarification-

THE COURT: This particular hearing has nothing to do about the defendant at this point -- nothing to do with him.

MR. LILLY: Am I permitted to make notes from Exhibit 1?

THE COURT: No notes.

MR. LILLY: Further, I have been prohibited--

THE COURT: No prejudice results from this. It is just a question of whether or not they

1  
2 complied, whether the arrest was a reasonable arrest  
3 in view of the fact of the time it took to arrest  
4 him and apprehend him and the unavailability pursuant  
5 to the Circuit Court rules.

6 That is all. Nothing to do with anything else.  
7 No damaging proof whatever against this defendant.

8 As a matter of fact, nothing to do with the  
9 charge against him.

10 MR. KAPLAN: Your Honor, I don't think it was  
11 your Honor's ruling that he couldn't confer with  
12 his client.

13 THE COURT: As much as he wants, but not to  
14 go over the papers with him.

15 You can talk with him all you want.

16 MR. LILLY: May I talk to him regarding my  
17 findings from Exhibit 1?

18 THE COURT: Put them down.

19 MR. LILLY: I am prohibited from discussing  
20 my findings?

21 THE COURT: You can talk to him all you want  
22 but not with those papers in your hands.

23 MR. LILLY: Can I discuss with him the  
24 contents of Exhibit 1?

25 THE COURT: That's your business. I have



1  
2 nothing to do with what you say to your client.

3 MR. LILLY: I can discuss with my client --

4 THE COURT: I will cease this hearing in about  
5 two seconds if you do not do what you are supposed  
6 to do.

7 If you want a hearing as to whether they sought  
8 out the defendant properly under the circumstances  
9 or whether or not they were able to find him or could  
10 have found him and didn't arrest him -- if you don't  
11 want one, we will stop the hearing here and now.

12 MR. LILLY: I am trying to comply.

13 THE COURT: Then comply with either one of those  
14 two requests. There is nothing else on the record.  
15 Either one of those two. I am not prohibiting you  
16 from talking to your client all you want. You may  
17 sit there from now until tomorrow morning. I do not  
18 care what you talk to him about. Leave the papers  
19 here.

20 There are no questions? I told you what you  
21 can do.

22 MR. LILLY: There is a question in my mind.

23 THE COURT: Not in my mind. It is as clear as  
24 it can be.

## CROSS - EXAMINATION

(cont'd) BY MR. LILLY:

Q In any event, Agent McElroy, you obtained the arrest warrant --

THE COURT: Let the record show that the attorney does not wish to sit down and discuss it with his client prior to asking questions.

Go ahead.

BY MR. LILLY:

Q Agent McElroy, you obtained an arrest warrant for the arrest of the defendant on February 7th, 1972; is that so?

A That's correct.

Q Is it your testimony that from the time of the alleged violation in the indictment, July 20th, until February of 1972, you did not undertake any steps to arrest him?

A Yes, we did.

One particular night, we had a call placed-- we had a meet set up that he was supposed to show up for, and he didn't show up.

Q That was prior to February 7th?

A I am not exactly sure.

Q I am trying to ascertain whether between the alleged violation of the indictment on July 20th of 1971



1  
2 hearing ever on due diligence in making  
3 an arrest. I want you to know that, the  
4 first hearing eve. I do not think you will  
5 find it in any of the courts throughout the  
6 United States. Now whether this is another  
7 right the defendant is entitled to I just  
8 exercised my discretion in view of the time  
9 in permitting this hearing to be held.  
10 Under ordinary circumstances I might not have  
11 permitted it.

12 MR. LILLY: Your Honor, I think there  
13 are factual issues and your Honor exercised  
14 your discretion correctly.

15 THE COURT: I think it is a question  
16 of due diligence of arrest and is only a one-  
17 sided situation and whether or not he takes  
18 the witness stand on his own case in the case  
19 proper he could always still attack the  
20 situation on the basis of the Sixth Amendment,  
21 on the basis of a speedy trial and denial of a  
22 speedy trial. I will give it some thought.

23 MR. KAPLAN: The defendant will obviously  
24 testify to the fact that he was not a fugitive,  
25 he was available during all this time.

1  
2 THE COURT: If I was to take  
3 everything that is obvious on a trial  
4 there would not be any trial.

5 MR. KAPLAN: If it was submitted to  
6 your Honor as a matter of determination  
7 rather than have him put on the stand than  
8 go through this pro forma type of testimony  
9 I would have no objection.

10 THE COURT: It is not a question  
11 whether he says he was. It is a question  
12 whether or not the Federal Bureau of Investigation  
13 exercised due diligence in attempting to seek  
14 him out as a fugitive. No matter what he says  
15 on the witness stand I do not think it affects  
16 the court's determination as to due diligence  
17 on their performing their job.

18 MR. LILLY: He has testimony on the  
19 subject of due diligence also, Judge. He has  
20 testimony with regard to his fugitive status.  
21 The government has urged that the motion must  
22 fail on the Fifth and Sixth Amendment and the  
23 six-month rule because he was a fugitive. He  
24 says he was not a fugitive and he is prepared  
25 to testify.



1  
2 MR. LILLY: Yes.

3 THE COURT: I have no comments on that.

4 MR. LILLY: It is that third issue I  
5 wanted to alert you that we will be intending  
6 to offer some testimony on.

7 A R I E L F E R N A N D E Z T O R R E S , defendant  
8 herein, having been first duly sworn, testified  
9 as follows:

10  
11 THE COURT: Mr. Fernandez, do you under-  
12 stand you are taking this witness stand with  
13 reference to one issue that is involved at this  
14 point, that is the question of whether or not,  
15 number one, you were a fugitive and, number two,  
16 whether the government exercised due diligence  
17 in trying to locate you; do you understand that?

18 THE WITNESS: Yes, sir.

19 THE COURT: In view of that no questions  
20 will be asked of you and you are protected as to  
21 any other questions that would be asked and the  
22 court will sustain an objection in violation of  
23 any other rights you have. Do you understand that?

24 THE WITNESS: Yes.

25 THE COURT: And you are taking the stand



1  
2 and you are protected under the Sixth  
3 Amendment. Do you understand that?

4 THE WITNESS: Yes.

5  
6 DIRECT EXAMINATION

7 BY MR. LILLY:

8 Q How old are you, Mr. Fernandez?

9 A Thirty-seven years old.

10 Q Tell the court your educational background.

11 A I took a test for high school diploma and passed it.

12 Q What was the last year - -

13 THE COURT: You took an equivalency  
14 test?

15 THE WITNESS: Yes.

16 Q What was your last year of formal education?

17 A In 1954.

18 Q What level was that?

19 A The last year of high school.

20 Q In June and July 1971, Mr. Fernandez,  
21 where did you reside?

22 A I assume that I was - -

23 THE COURT: No, he cannot assume  
24 anything. He has got to tell us where he  
25 resided. If he was in the jurisdiction he

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Q This was in connection with your job  
as a superintendent?

A That is right.

Q You say you remained a resident at  
5 Polk Street as a superintendent until when?

A Until I went to the State Hospital.

Q When was that?

A That was around July.

Q What is the name of the hospital?

A I think it is Graystone State Hospital.

Q What were you there for?

A I tried to commit suicide.

Q You were a psychiatric patient there?

MR. KAPLAN: Objection, your Honor,  
it is immaterial.

THE COURT: Sustained.

MR. LILLY: Not with regard to his  
prejudice.

THE COURT: I do not care what he  
was there for. The question just tells us  
where he was and the reason for being there  
is immaterial.

MR. LILLY: If he suffered psychiatrically  
during this period of delay that would be a



1  
2 claim for prejudice?

3 MR. KAPLAN: I would ask any remarks  
4 be stricken from the record especially one  
5 of suicide.

6 MR. LILLY: We cited in our brief a  
7 case to that every effect. A defendant  
8 claimed prejudice during that delay period  
9 who was a psychiatric patient and we think  
10 it is relevant.

11 THE COURT: All right, go ahead.

12 Q Were you registered in the Good Samaritan  
13 Center under your name, Fernandez?

14 A Yes, sir.

15 Q When you took the job at 5 Polk Street did  
16 you take it in your name, Fernandez?

17 A I had to show my Social Security card.

18 Q Do you recall the period of time you were  
19 a patient at Graystone under your name, Fernandez?

20 A That is right.

21 Q When is it you were arrested?

22 A October 5, 1973.

23 Q Where were you arrested?

24 A I went to the unemployment agency in Paterson,  
25 New Jersey to collect my unemployment check.

1  
2 Q You say that took place on East 98th Street?

3 A On Ralph - - and Ralph Avenue.

4 Q Since June or July 1971 until the arrest  
5 October 5, 1973 have you taken any steps to evade federal  
6 agents or police officers?

7 A Why should I? I didn't know I was being looking for.

8 Q When you were arrested on October 5, 1973  
9 did one of the agents make a comment about trying to  
10 arrest you earlier?

11 A Yes. When I was brought from Paterson to New York  
12 one of them said, "We had you and we let you go at that  
13 time in Brooklyn."

14 Q One of the arresting agents?

15 A Yes.

16 Q He was making a joke of it?

17 A I was arrested by the narcotic police in Paterson.  
18 The one who asked me the question was one of the agents  
19 that transport me from Paterson to New York.

20 Q That was one of those agents?

21 A One of those agents.

22 Q Do you have any records or documents  
23 indicating what you were doing on June 9, 1971 to - -

24 MR. KAPLAN: Objection as irrelevant.

25 THE COURT: Sustained.



1  
2 MR. LILLY: I respectfully submit  
3 that his inability to refer to records or  
4 recall the events of that time are part of  
5 the prejudice issue that he must raise in  
6 order to establish his rights under the  
7 Sixth Amendment.

8 THE COURT: Does he have writings?  
9 Did you have a diary where you were?

10 THE WITNESS: No, sir.

11 THE COURT: Did you ever carry a  
12 little diary with you and put down addresses  
13 you stayed at and numbers you were at and  
14 streets you walked down and what you did on  
15 certain dates?

16 THE WITNESS: No.

17 THE COURT: You never did anything  
18 like that?

19 THE WITNESS: No.

20 Q People you may have spoken to on those  
21 dates, June and July 1971?

22 A Let me say something. For 1971 until I went to  
23 Paterson in 1973 I was using dope and I was in a state  
24 hard for me to remember things. Besides that - -

25 MR. KAPLAN: Objection to these

1 gratuitous remarks.

2 THE COURT: They are gratuitous.

3 MR. LILLY: I submit they are  
4 relevant with regard to his mental state,  
5 his physical state, his inability to recall,  
6 the fact he did not keep records of what he  
7 was doing. That is all part of the prejudice  
8 case.  
9

10 MR. KAPLAN: That is a matter for the  
11 jury, your Honor.

12 THE COURT: We will take a short recess.

13 (Whereupon, a recess was taken.)

14 BY MR. LILLY:

15 Q Aside from your lack of records are you  
16 able to recall who you spoke to on June 9 and July 20, 1971?

17 A I do not, I cannot remember, I cannot even remember  
18 who I talked to three months ago.  
19

20 MR. LILLY: That is all I have.

21 CROSS-EXAMINATION

22 BY MR. KAPLAN:

23 Q During June and July 1971 you were living  
24 with Miss Velez, is that right?  
25



1  
2 remained on the lam for another couple of  
3 years before we would have caught up with him.  
4 It was just fortuitous that he happened to be  
5 receiving welfare checks or employment checks  
6 in Paterson, New Jersey.

7 As far as Mr. Fernandez lack of memory,  
8 your Honor, that is a matter for your Honor to  
9 determine his own credibility as to whether he  
10 could remember some things but not rather con-  
11 veniently to remember other things.

12 It is also submitted it is highly  
13 irrelevant what he can remember about the facts  
14 in question. There is no Statute of Limitations  
15 problem. The man was a fugitive and the agents  
16 did their best to find him.

17 THE COURT: The court is ready to  
18 announce its decision with reference to the  
19 limited hearing that has been held as to the  
20 issues raised by the defendant as to the  
21 timeliness of the arrest and/or the timeliness  
22 of proceeding to trial.

23 The court afforded the hearing to the  
24 defendant Torres upon his application of being  
25 prejudiced in view of the delay, arrest and

1  
2 the indictment of the defendant. The defendant  
3 charges lack of due diligence on the part of  
4 the government and could not under the circumstances  
5 have unreasonably declared the defendant a  
6 fugitive.

7 The court has waived the testimony of  
8 the agent, his efforts and the Department's  
9 efforts in locating the defendant and likewise  
10 the statements made by the defendant, limited to  
11 the proceeding in his behalf.

12 At this point the court cites D-5 (d)  
13 under Prompt Dispositions of Criminal Cases of  
14 this circuit which reads:

15 "The period of delay resulting from the  
16 absence or unavailability of the defendant. A  
17 defendant should be considered absent whenever  
18 his location is unknown. A defendant should be  
19 considered unavailable whenever his location is  
20 known but his presence for trial cannot be  
21 obtained by due diligence."

22 The court finds the government did  
23 exercise due diligence in seeking defendant,  
24 whose identity, to say the least, is questionable  
25 and also to declare him a fugitive in making a



1  
2 search to bring him to trial.

3 That is the court's determination.

4 The court likewise finds none of the  
5 rights of the defendant were violated.

6 We are going to recess. We cannot  
7 select a jury anymore today. I must proceed  
8 with the other one and finish the other one  
9 today. We will bring in a jury tomorrow morning.  
10 We will expect you promptly at 11:00 o'clock  
11 tomorrow morning.

12 MR. KAPLAN: Your Honor is aware of the  
13 problem that I have a witness from out of the  
14 country and I would like to keep him throughout  
15 the whole trial.

16 THE COURT: The trial will start tomorrow.

17 MR. KAPLAN: And finish this week?

18 THE COURT: No question in my mind.

19 (Whereupon, the trial was recessed  
20 until the following day at 11:00 o'clock a.m.)

21 \* \* \*

1 63 Carter - direct

2 A Yes, sir, I did.

3 Q What was your name at that time?

4 A Art.

5 Q Where were you supposed to be?

6 A I was from Atlanta.

7 Q You were Art from Atlanta?

8 A Yes.

9 Q What duties did you perform on June 9th,

10 1971 in your undercover capacity?

11 A I had a meeting with an informant on that date.

12 Q By the informant, you mean Mr. Valdez

13 who just testified?

14 A Yes, sir.

15 Q And you debriefed him at that time?

16 A Yes, sir, I did. I talked to him along with

17 Agent McElroy and other agents of our Bureau.

18 Q Mr. Valdez was operating under your

19 direction; is that correct?

20 A Yes, sir. In a sense. And under Agent McElroy's

21 direction.

22 Q Now, what did you do on June 9th, 1971?

23 A On June 9th we met with Mr. Valdez, I believe his

24 name was, and we made plans to purchase or attempt to

25 purchase a quantity of heroin from someone he claimed



1 64 Carter - direct

2 that he had met and could sell that amount. I think  
3 the amount was an eighth of a kilo of heroin.

4 Q Do you happen to recall where you met  
5 Mr. Valdez?

6 A I met him at his place of business in Brooklyn  
7 on Jamaica Avenue.

8 Q Tell us what you did in furtherance of  
9 that particular plan?

10 A Well, after the plans were formulated, Agent  
11 McElroy gave me \$3700.00, government funds, and we were  
12 told - - I was told that I was supposed - - that the  
13 informant, Mr. Valdez, we were supposed to meet with a  
14 person by the name of Ray at a bar in Brooklyn. And  
15 subsequent to our conversation we went to that bar. I  
16 think it was Dave's Blue Room on East 98th Street and  
17 Rutland Road in Brooklyn.

18 Q And you arrived at the bar with Mr. Valdez;  
19 is that correct?

20 A Yes, sir, I did.

21 Q Did there come a time when you met with  
22 another individual in the bar?

23 A Yes, sir. There came a time when another individual  
24 arrived at the bar and joined our conversation.

25 Q Who is that?



1 65 Carter - direct  
2 A Mr. Fernandez.  
3 Q Ray Fernandez?  
4 A Ray. At that time I knew him as Ray.  
5 Q Subsequent to that - -  
6 A Subsequently identified as Ray Fernandez.  
7 Q Would you point him out to the members  
8 of the jury?  
9 A Mr. Fernandez is sitting with the green undershirt - -  
10 I believe it's green, and the open shirt at the defense  
11 table.  
12 Q So you met with Ray Fernandez and you had  
13 already been with Valdez?  
14 A Yes, sir.  
15 Q What was the conversation taking place at  
16 that time?  
17 A There was a conversation taking place at that time.  
18 It was in Spanish and sometimes in English.  
19 Q In other words, Valdez and Fernandez  
20 were talking in Spanish?  
21 A Yes, sir, they were.  
22 Q And was Valdez translating for you at that  
23 time?  
24 A He would stop intermittently and tell me what they  
25 were saying. That is, Mr. Valdez would stop and tell me.

2 Q Can you indicate to us Mr. Fernandez's  
3 demeanor or his attitude at that time?

4 A Mr. Fernandez appeared to me to be very nervous  
5 about my being there.

6 Q He didn't know you, did he?

7 A No, sir, he didn't know me.

8 Q He had never seen you before?

9 A No. Not to my knowledge.

10 Q You were introduced by Mr. Valdez?

11 A Yes, sir.

12 Q As Art from Atlanta?

13 A Yes, sir.

14 Q Did there come a time when you talked to  
15 the defendant in English?

16 A Yes, sir, I did.

17 Q What if anything did you say?

18 A Well, I told him I was becoming quite annoyed  
19 because we had been sitting there for a long time. Like  
20 a hassle back and forth about who is going to take the  
21 money from whom. And I told him I had to catch a flight  
22 to Atlanta and I wanted to get it over with. And I  
23 asked him at that time if the heroin that he could get  
24 for me, if it was good stuff.

25 Mr. Fernandez indicated to me that it was good



2 I said, "I don't know. I probably will be  
3 travelin by a rental car or get a cab."

4 He said, "If you get a cab, tell the cab driver  
5 to drive you to Broadway and Myrtle in Brooklyn and go to  
6 a bar there called the Oasis Bar."

7 And he asked me if I knew Brooklyn very well and I  
8 told him, no. Just a very trief conversation. And I told  
9 him I will see him.

10 He said, "Once you get to that bar, call me."

11 Q Did you have his number at that time?

12 A Same number that I was talking to him on then.

13 So I told him I would - - as soon as I got there, I told  
14 him I'll call him.

15 Q Did you proceed to the bar?

16 A Yes. Around 2:00, 2:30 that afternoon. The call  
17 was placed to him around 12:00, 12:30 on the 20th. It was  
18 around 2:20, 2:30 that I arrived at the Oasis Bar. At  
19 that time I placed a call to Mr. Fernandez.

20 Q Did you speak to him?

21 A I did.

22 Q Did you have a conversation with him?

23 A Very brief conversation. He told me he'd be  
24 right down.

25 Q That was the substance of the conversation?

1 79 Carter - direct  
2 A That was the substance of the conversation.  
3 Q Did he proceed to the bar?  
4 A Yes. He arrived there about twenty minutes later.  
5 I guess around 2:50, 2:55 he arrived at the bar.  
6 Q He came into the bar?  
7 A He came into the bar.  
8 Q Did he come over to you?  
9 A He joined me.  
10 Q Did he recognize you right away?  
11 A He recognized me.  
12 Q You sat down?  
13 A He sat down, had a beer.  
14 Q Do you happen to recall who else was in  
15 the bar?  
16 A At that time in the bar I recall group supervisor  
17 Richard Ferry. I believe he was in the bar. There were a  
18 couple of other agents there in the bar. And there was - -  
19 well, the bar was almost empty. There was a female in the  
20 bar at that time I believe. A female, yes.  
21 Q You sat down with Ray?  
22 A Yes. We sat down.  
23 Q At a table?  
24 A At a table.  
25 Q Just the two of you?



1 80

Carter - direct

2 A Just the two of us. The table was - - it was a  
3 very small bar and the table was right near the phone booths  
4 right across from the bar. The bar was over there. I was  
5 sitting here by the table and there is a phone booth right  
6 beside it.

7 Q Did you have a conversation with him at  
8 that time?

9 A We had a conversation.

10 Q What did you say to him and what did he  
11 say to you?

12 A Well, we had a general conversation at first about,  
13 you know, the last deal. And I told him I was in town and  
14 I wanted to do it again. I said - - I asked him could he  
15 do it for me. He indicated to me, yes, he could for the  
16 same price of \$3700. And we got to talking about him and  
17 also could he produce - - could he get a kilo for me. He  
18 said, yes, he could for about 28,000, he said, but I would  
19 need to give him a day in advance.

20 And I also told him that I did not want to be held  
21 up this time like I was before. In other words, I didn't  
22 want to be delayed. I wanted to get out of New York. I  
23 wanted to leave. And he indicated to me that sometime his  
24 man has it and sometimes his man has to get it. By his  
25 man I assume he was talking about his source.

1 81

Carter - direct

2 And he told me that he - - if I really want him  
3 to do it, go ahead and let's give him the money so he  
4 could proceed. And that was the gist of the conversation.

5 And I kept - - I kept trying to get him to under-  
6 stand that I didn't want to be delayed this time on  
7 this deal.

8 Q Did he say anything about larger quantities  
9 of heroin?

10 A He told me he could get me as much as I wanted.

11 MR. LILLY: I object to this  
12 reference of larger quantities of heroin.

13 THE COURT: Yes.

14 Q What else did he say to you at that time?

15 A Well, he told me when I called him on the phone  
16 not to talk about any drugs. He said if I wanted to get  
17 the same thing, try to give me - - we tried to draw up a  
18 little signal about how we were going to discuss it on the  
19 telephone. If I wanted a kilo, he told me to say, "I want  
20 the whole bunch of beers."

21 B-E-E-R-S, I remember that. And if I wanted the  
22 same thing, he said I should just tell him - -

23 MR. LILLY: I think all of this is  
24 immaterial. I am objecting to "we are talking  
25 about - - "



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THE COURT: We are talking about a subsequent - - I don't think it's material. Just the conversation.

MR. LILLY: He's talking about events that specified that he - - the indictment specifies two dates. I think the examination should be under those two events.

THE COURT: Yes. These are all subsequent.

Q Did you talk about money at that time?

A Talk about money?

Q Did you talk about how the money was going to be passed at that time?

A Yes. During the conversation I attempted to give him the 3700. After I agreed on a price and all that, I attempted to give Mr. Fernandez the money. He told me that he did not want to take the money from me. He indicated to me, however, that he was not in the bar alone. And at that time I made a check of the bar and most of the people were agents, except one female at the bar. And he told me to take the money and go inside the telephone booth and put the money on the little ledge above the telephone.

And I expressed my concern about that. I said, "Listen, somebody could get my money in this kind of thing."

He said, "No. As soon as you come out, someone is

1 83 Carter - direct  
2 going in and they will get the money."

3 And he told me during the same conversation - -  
4 he said, "You call me around 6:00 o'clock P.M."

5 And he kept indicating to me, "Don't get nervous.  
6 Don't get excited."

7 So I told him, "Okay."

8 At that time I got up from the table, I went inside  
9 the telephone booth and I pretended to make a phone call.  
10 And I left on the ledge above the telephone in a brown bag,  
11 wrapped up, \$3700.00. And I walked out the phone booth.

12 Now, my table was right adjacent to the telephone  
13 booth where I could see the phone booth very well as to  
14 who would come out. I went back and took a seat. And as  
15 soon as I came out I observed a female who was later  
16 identified to me as Martha Velez, she went inside of the  
17 telephone booth, stayed for a few minutes, and she came out  
18 and she left the bar.

19 A few minutes thereafter we ended our conversation  
20 and Mr. Fernandez told me to be sure to call me at 6:00  
21 and he would have my package. And he left the bar.

22 Q Did you go back into the phone booth to  
23 check out if the money was gone?

24 A As soon as he left the bar I got up and I went  
25 inside the telephone booth and I checked where I placed



1 125 Velez - direct

2 A Yes.

3 Q Where were you working during 1970

4 and 1971?

5 A In LaSambra Bar and Grill.

6 Q Tell us for how long a period of time

7 you lived with Mr. Fernandez.

8 A On Jefferson?

9 Q On Jefferson Street.

10 A About five months.

11 Q Were you living with him during June and

12 July, 1971?

13 A (Nodding affirmatively.)

14 Q Directing your attention to July 20, 1971

15 do you happen to recall what you were doing that day?

16 A I was home and then - - I was home.

17 Q Did you have a conversation with Ray

18 Fernandez that day?

19 A Yes.

20 Q Tell us the nature of the conversation;

21 what you said to him and he to you.

22 A He told me to do him a favor and go to the Oasis

23 Bar and pick up a package on top of a telephone booth.

24 Q Did there come a time that you went to the

25 bar?

2 A Yes.

3 Q You sat in the bar?

4 A Yes.

5 Q Where did you sit?

6 A At the bar on a stool.

7 Q Where was the phone booth in relation  
8 to where you sat?

9 A A couple of feet across from me.

10 Q A couple of feet?

11 A Across.

12 Q Was Mr. Fernandez in the bar when you  
13 were sitting there?

14 A Yes.

15 Q Who was he sitting with?

16 A A black man.

17 Q Can you point him out?

18 A I couldn't point him out.

19 THE DEFENDANT: She's lying.

20 THE WITNESS: I didn't see him very well.

21 THE COURT: You must not call out and  
22 you must not respond.

23 Q Did there come a time when you did  
24 something?

25 A Yes.



1 127

Velez - direct

2 The man went in the phone booth and I waited  
3 and then went in the phone booth.

4 Q The man with Ray went in the phone booth.  
5 Did you see him do anything?

6 A I watched him.

7 Q Then what did you do?

8 A Went in the phone booth and took off a package  
9 wrapped on top of the phone booth.

10 Q On the ledge?

11 A Yes.

12 Q Describe the package.

13 A It was wrapped up. I think it was brown. I  
14 don't remember the color but I think it was wrapped up.

15 Q What did you do with the package?

16 A I went back to 27 Jefferson Street.

17 Q Did there come a time when you saw Ray  
18 Fernandez later that day?

19 A A little while later.

20 Q He came to the apartment?

21 A Yes.

22 Q What happened when he got to the apartment?

23 A He took the package.

24 Q Did you inquire of him what was in the  
25 package or what it was about?

1 128

Velez - direct

2 A No. He just told me "Leave the package alone.  
3 Bring it upstairs (and wait till I get there."

4 Q Did he open it in your presence?

5 A No, he just told me it was money. I wasn't in  
6 the room.

7 Q Did you ask him what the money was for?

8 A No.

9 Q Did he ever offer an explanation of what  
10 the money was for?

11 A No.

12 Q Did there come a time when you were  
13 arrested in connection with this case?

14 A Yes.

15 Q Was that on February 16, 1972?

16 A Yes.

17 Q Were you later released from custody?

18 A Yes.

19 Q Was the complaint against you dismissed?

20 A Yes.

21 Q There are no charges pending in this case  
22 for you; is that correct?

23 A No.

24 Q Have there ever been threats or promises  
25 made by the government with respect to your testimony in



1 A No.

2 Q During that period that you were  
3 residing with Mr. Fernandez did you have your squabbles  
4 and fights over that period?  
5

6 A Yes.

7 Q Had your misunderstandings?

8 A Yes.

9 Q And when you were arrested on February 16  
10 how long did you remain in jail?

11 A Fourteen days.

12 Q And during those fourteen days did Mr.  
13 Fernandez visit you?

14 A No.

15 Q Did Mr. Fernandez communicate with you  
16 at all?

17 A No.

18 Q Did Mr. Fernandez in any way indicate  
19 that he would assist in getting you released from jail?

20 A No.

21 Q Did you hear from any friends or  
22 relatives while you were in jail?

23 A No.

24 Q What time of day was it when you visited  
25 the bar on July 20?

1 131 Velez - cross

2 A It was in the afternoon, about 1:00. I know

3 it was in the afternoon.

4 Q And for what period of time did you have

5 that package in your possession?

6 A The most was about ten minutes.

7 Q Is that ten minutes at Jefferson Street

8 or ten minutes from the time you picked it up at the bar

9 and got back to Jefferson Street?

10 A Jefferson Street.

11 Q Just Jefferson Street?

12 A Yes.

13 Q How long did it take you to get from the

14 bar to Jefferson Street?

15 A No more than three minutes.

16 Q During that period of time did you

17 examine the contents of that package?

18 A No.

19 Q Where were you arrested on February 16?

20 A On Lafayette - - I don't remember the number. I

21 was then living on Lafayette Street. We moved from

22 27 Jefferson Street to Lafayette.

23 Q When you say "We" who do you refer to?

24 A Ray Fernandez and I.

25 Q So, in addition to living with him at



1 132 Velez - cross  
2 Jefferson you lived with him at Lafayette?  
3 A Yes.  
4 Q What time were you arrested?  
5 A 4:30-something to 5:00 in the morning.  
6 Q Were you awake?  
7 A No, I was coming from work. They came right  
8 behind me, knocked on the door and I went downstairs and  
9 opened the door.  
10 Q Who is "They"?  
11 A The agents.  
12 Q How many agents?  
13 A About six, I think.  
14 Q Are any of them in the courtroom now?  
15 A Yes.  
16 Q Who is present in the courtroom that was  
17 present at your arrest?  
18 A This gentleman there (indicating).  
19 MR. KAPLAN: Agent McElroy.  
20 Q The agent in the blue tie?  
21 A Yes.  
22 Q Prior to that occasion, February 16, had  
23 you ever seen him before?  
24 A Never.  
25 Q Had you ever been confronted or near

1 133

Velez - cross

2 arrest prior to February 16 by federal agents?

3 A Excuse me?

4 Q Did any agents attempt to arrest you  
5 prior to February 16 - -

6 MR. KAPLAN: I'm going to object  
7 to that.

8 THE COURT: Sustained.

9 A No.

10 Q In any event, the arrest was with six  
11 agents entering your apartment February 16?

12 A Yes.

13 Q Did they take you immediately out of the  
14 apartment?

15 A About fifteen minutes - -

16 MR. KAPLAN: I object. This  
17 is irrelevant.

18 MR. LILLY: It goes to credibility.

19 THE COURT: Whether she had six  
20 people arresting her or two, what difference?

21 MR. LILLY: I think it makes a  
22 difference.

23 THE COURT: That's not the purpose of  
24 her testimony.

25 MR. LILLY: We are going to voluntariness.



1 134

Velez - cross

2 THE COURT: She was arrested.

3 She admits being arrested.

4 Q By six agents?

5 A Yes.

6 Q Where did they take you?

7 A To Manhattan.

8 Q Do you know where?

9 A I think on Fourth Street. I don't remember.

10 I was nervous then.

11 Q You were nervous?

12 A Yes.

13 I know it was a federal building.

14 Q Did they question you when they got you  
15 there?

16 A Yes.

17 Q When they first took you into the federal  
18 building did you indicate that you knew nothing about Mr.  
19 Fernandez being involved with drugs?

20 A Right.

21 Q And you protested that you were not involved  
22 in drugs?

23 A Yes.

24 Q And you had no knowledge of Mr. Fernandez's  
25 sale of heroin?

1 A Not selling it. I used to use it. That's the  
2 period I was using it but not that he sold it, no.

3 Q You indicated that you knew nothing  
4 about Mr. Fernandez being involved with the sale of heroin?

5 A No - - right.

6 Q That's what you told them?

7 A Right.

8 Q How long did you remain in that federal  
9 office building?

10 A Until the next morning when they took me to court.

11 Q Do you remember what time of day that was?

12 A About 10:00 - - after the other agents came in  
13 that relieved them.

14 Q So, it was the second shift of agents  
15 that came in?

16 A Right.

17 Q Do you remember what time the second shift  
18 of agents took over?

19 THE COURT: Are you asking whether  
20 or not any fear was there because of the  
21 fact she was arrested? If so, then ask her.  
22 You don't have to go through this.

23 I haven't warned her because I didn't  
24 know what she would say.  
25



MR. LILLY: I think it is helpful  
to know what time the second shift - -

THE COURT: You don't have to  
develop it that way with a full ritual.

She is not your witness. She is  
here for one purpose only. She is testifying  
to an incident. You have a right to cross-  
examine on that incident and anything else  
is collateral. If you have a collateral  
question ask it directly.

Q Do you remember the time of day?

A When the second shift came in?

Q Yes.

A About 8:30 in the morning.

Q Did you indicate to the second shift or  
first shift - -

A First shift - -

Q (Continuing) - - that Mr. Fernandez  
gave you the directions to pick up the package?

A First shift.

Q Do you remember what time you indicated  
that you received the directions from Mr. Fernandez?

A It must have been five or six in the morning.

Q When was the last time you had slept?

1 137

Velez - cross

2 MR. KAPLAN: Objection.

3 THE COURT: Sustained, sustained.

4 This is not that kind of hearing.

5 It is not a hearing for this purpose at all.

6 Objection sustained.

7 Q Did the agents indicate to you that  
8 there was going to be a prosecution against you as a co-  
9 conspirator?

10 A Yes.

11 Q Did they do that before or after you  
12 indicated to the agents that Mr. Fernandez gave you that  
13 direction?

14 MR. KAPLAN: I object to this, too.

15 It's irrelevant.

16 THE COURT: I will allow the question.

17 MR. KAPLAN: There are no pending  
18 charges - -

19 THE COURT: I will allow the question  
20 in any event.

21 A I think they told me that I could have been - -  
22 I could have a conspiracy in this trial.

23 Q Did they tell you that before you  
24 indicated that you had the direction from Mr. Fernandez to  
25 pick up the package?



goods could be obtained. Who was it who delivered the goods? Who was the seller? That's the function of the seller - - to deliver the goods. How did Mr. Carter find out where the goods were? Who told him? Who? Mr. Valdez told him. Mr. Valdez told him and wouldn't it be an easy role for Mr. Valdez to assume - - that of a seller of hard narcotics? He had been doing it for years, knew the ins and outs of the business. This might have been a little out of his pattern but I submit that he was the one that got the money; that he was the one that directed Carter as to the place in which the narcotics could be picked up and that he, Jimmy Valdez, was the seller.

Interesting, in the course of Mr. Valdez's testimony, that he did not identify the defendant at the defense table as Fernandez. Mr. Carter pointed Mr. Fernandez out. Martha Velez pointed Mr. Fernandez out. Interesting, Mr. Valdez never did point the accusing finger at Mr. Fernandez - -

MR. KAPLAN: Objection.

THE COURT: Yes. I think the

jury's recollection is what will count.

If you, the jury, do not agree on who did what, it is what you remember, what you recollect rather than what he tells you.

I will sustain the objection.

MR. LILLY: By way of identifying the person in the Blue Room, Mr. Valdez said he weighed something less than a hundred pounds -- whoever it was. He couldn't remember the length of his hair or if he had a mustache. He just told us that the person in the Blue Room weighed something less than a hundred pounds and it is my recollection at no point did he point the identifying finger at Mr. Fernandez.

Also, Mr. Valdez indicated that he was not able to identify the voice at the window as the voice of the individual he identified as Fernandez back in the Blue Room.

Agent Carter candidly told us that he relied largely on Mr. Valdez as to what the substance of the conversation was between the two Valdez brothers and Mr. Fernandez. He had no proficiency in the Spanish language. He was at the mercy of Mr. Valdez.



1  
2 It was the shrewd Jimmy Valdez who  
3 suggested to Mr. Carter that the money be  
4 paid over to Valdez. It was Carter's decision  
5 to go along with that but it was Mr. Valdez  
6 who made the suggestion that the money be paid  
7 over to him.

8 Again, it was Mr. Valdez who accompanied  
9 Mr. Fernandez out to the vehicle. I submit, at  
10 best, you can only be uncertain in view of the  
11 record as it appears before you. In any event,  
12 it was Mr. Valdez accompanying Mr. Fernandez  
13 out of the presence of Mr. Carter so Mr. Carter  
14 was not able to see the alleged transfer of the  
15 money.

16 Mr. Carter was also asked by the govern-  
17 ment attorney to describe the Fernandez that he  
18 had met with in Dave's Blue Room and he described  
19 him as being much thinner and to that extent Mr.  
20 Carter's description coincided with the description  
21 by Mr. Valdez, that the individual in Dave's Blue  
22 Room weighed something less than a hundred pounds.

23 Now, the lighting in the Blue Room, if  
24 it was consistent with lighting in most bars,  
25 most cocktail lounges - - I don't hold myself

1  
2 out as an expert - - but to the extent I  
3 have been in bars and cocktail lounges they  
4 are not lit up like this courtroom as today.  
5 My experience indicates that - - and I am  
6 sure it is yours - - that lighting in these  
7 places most often is quite subdued. I submit  
8 in Dave's Blue Room it was probably blue  
9 lighting. There is usually not white lighting  
10 in most of these places and under that subdued  
11 lighting, Mr. Carter said he observed an  
12 individual with blue tinted glasses - - and I  
13 think it is unusual for a bar - - and he  
14 described the individual as an individual with  
15 his hat on.

16 Now, in the dim lighting you have an  
17 individual with his hat on, blue sunglasses  
18 and not the ideal situation in which to observe  
19 anyone and try to make a reliable identification,  
20 particularly when a period of two and a half  
21 years is going to elapse between the events in  
22 Dave's Blue Room and the attempt to identify him  
23 here in the courtroom.

24 We submit that the individual attempted  
25 to be described by Mr. Valdez - - think, less



1  
2 than a hundred pounds with no other particulars  
3 to tell us about and the individual described  
4 by Mr. Carter as an individual much thinner  
5 than the defendant as he appeared before you  
6 with glasses and a hat on, we submit they very  
7 well may have been talking about the same  
8 individual but not Mr. Fernandez. Mr. Carter  
9 could make no reference to a mustache. The  
10 defendant had a mustache until a short period  
11 ago and certainly, had it during June and July  
12 of 1971.

13 Mr. Carter again, candidly testified  
14 that in transferring the funds over to Mr.  
15 Valdez he had some reluctance and recognized it  
16 as a deviation from government policy but he  
17 nevertheless went ahead with that procedure.

18 On July 20 he is confronted again with  
19 a request that he follow an unusual procedure;  
20 that he again deviate with regard to the transfer  
21 of these government authorized funds and again  
22 reluctantly, he went ahead with the deviation.  
23 The result is that on two occasions he delivered  
24 \$3700.00 in a way not consistent with government  
25 policy. The total sum of money involved \$7400.00

that was transferred in an extraordinary way. I can well imagine that there are many situations in which agents in this field wind up transferring over government funds and never seeing them again and I am not urging that that's a totally abnormal or unusual situation for the government agents to find themselves in but in this situation the government lost \$7400.00 and coupled with that, is that they didn't have a defendant so that they had, what I regard as a pressure situation for Mr. Carter. He didn't have the \$7400.00 and he had no defendant. The last time he saw the defendant was July 20, 1971 and I could well understand that the pressures would begin to mount as the months went by, in 1971 as the months went by and in 1972 as the months went by - - no \$7400.00 and no defendant.

In 1973 the months go by and Mr. Carter has not produced the money and he has not produced the defendant and he badly needed a defendant and contacted the defendant who now sits at defense table and he became it - -

MR. KAPLAN: I object.